Unifirst Corporation *and* Laundry Workers Union Local 66L, a/w Union of Needletrades, Industrial 7 Textile Employees, AFL–CIO, CLC. Cases 1–CA–39267 and 1–CA–39321

January 16, 2004[1]

ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

Counsel for the General Counsel's Response to Respondent's Reply to Resubmission of General Counsel's Brief in Support of the Administrative Law Judge's Decision, in which counsel for the General Counsel asks the Board to reject Respondent's Reply, is granted. Respondent's Motion for National Labor Relations Board to Consider Respondent's Reply to Resubmission of Brief of General Counsel and Respondent's Objection to Resubmission of Brief of General Counsel are denied.

The Respondent seeks to reply to the brief in support of the administrative law judge's decision, submitted by the General Counsel. The Board's Rules make no provision for a brief in reply to a brief filed in support of an administrative law judge's decision, and the Board accordingly has stricken such a reply brief. *National Metalcrafters*, 276 NLRB 90 fn. 1 (1985).[2] No special circumstances here warrant a departure from this approach. Nevertheless, to the extent that the brief in support filed by the General Counsel contains argument that is no longer relevant, the Board, consistent with its established policy, will disregard it.

Dated, Washington, D.C., January 16, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

The General Counsel submitted a posthearing brief to the judge. The judge's decision has rendered substantial portions of that brief irrelevant, presumably unhelpful, and potentially misleading. Despite this, the General Counsel has now submitted that same brief in its entirety to the Board relabeled as a brief in support of the judge's decision. As a result, the Respondent has moved for the Board to consider its Reply to Resubmission of Brief of General Counsel or, in the alternative, its Objection to Resubmission of Brief of General Counsel. My colleagues deny Respondent's motion. Because I find both that my colleagues' reasons for denying Respondent's motion are unpersuasive and that our review of the General Counsel's resubmitted brief without consideration also of Respondent's Reply inconsistent with fair process, I respectfully dissent.

Section 102.46(a) of the Board's Rules and Regulations provides that a party "may file a brief *in support of* the administrative law judge's decision" (emphasis added). My colleagues recognize that the Rules do not authorize a party to resubmit to the Board in support of a judge's decision that party's posthearing brief to the judge. However, citing prior Board cases, they note that the Board has a past practice of permitting parties—I would add, more often than not, the General Counsel—to resubmit such briefs. My colleagues then assert that "the Rules do not authorize any response to a brief in support of the judge's decision." True enough, but that is not the end of the matter. For, as my colleagues themselves make clear, the Board, under the guise of past practice, allows parties to submit briefs that are not specifically authorized under the Board's Rules.[1] Implicit in my colleagues' argument, then, and in their denial of the Respondent's motion, is the assertion that, in contrast to the practice of filing posthearing briefs as briefs in support of a judge's decision, there is no past practice of permitting the filing of such a response.[2] Fair enough, but the absence of such a past practice does not resolve the issue presented here because in none of the cases cited by my colleagues did the respondent object to the General Counsel's filing of its posthearing brief as its brief in

[1] This Order issued on December 9, 2003, as an unpublished Order.

[2] Our dissenting colleague would distinguish *National Metalcrafters* on the basis that the supporting brief filed by the General Counsel there may not have been a resubmission of the brief filed with the administrative law judge. This possible distinction is immaterial, because the Board's long-established practice is to permit the General Counsel to resubmit his earlier brief. See, e.g., *Rennie Mfg. Co*., 202 NLRB 1117 (1973), enfd. mem. 502 F.2d 1159 (1st Cir. 1973).

[1] For example, in *Baker Electric*, 330 NLRB 521 fn. 4 (2000), the Board explained that "[a]lthough not expressly provided for in Section 102.24 [of the Board's Rules], it is the Board's practice to permit the party moving for summary judgment to file a reply brief[.]"

[2] My colleagues rely, in effect, on *National Metalcrafters*, 276 NLRB 90, fn. 1 (1985), for this proposition. It is difficult to discern exactly what occurred in *National Metalcrafters*, or the reasons for the Board's decision striking a respondent's reply brief, that is, whether the Board rejected the Respondent's contention that the General Counsel's brief included multiple exceptions to which it was entitled to respond. One thing is certain, however, *National Metalcrafters* did not involve the resubmission of a prehearing brief the irrelevancy of large portions of which was not contested by the General Counsel.

support of the judge's decision and seek to bring to our attention the difficulties and unfairness posed by the General Counsel's resubmission. Respondent has done so here. For the following reasons, I would grant the Respondent's Motion to file its Reply Brief for the Board's consideration or, in the alternative, its Objection to General Counsel's resubmission of his original posthearing brief as a brief in support of the judge's decision.

According to the Respondent, the General Counsel's resubmission requires a response because the resubmission

> includes lengthy irrelevant passages based on the Judge's dismissal of the majority of the Union's unfair labor practice charges, virtually all of the Union's witnesses' testimony he either discredited or considered "mixed up," and the overturned legal precedent upon which he relied. Respondent's Motion to Consider Respondent's Reply Brief to Resubmission of or Objection to Resubmission at p. 2, para. 5.
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> Given the inapplicability of most of its content, Respondent had no way of discerning that this was the type of document identified in Section 102.46 as a supporting document nor that Respondent needed to sift through the document to determine which passages were intended as support and which should have been considered something else. Id. at para. 6.
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> Contrary to General Counsel's assertion, Respondent, when it filed its exceptions, did not address nor had the opportunity to address the General Counsel's original brief. . . . Id. at para. 9.[3]

In its opposition, the General Counsel neither denies nor refutes these assertions. Nor do my colleagues now address any of the above assertions or the other unchallenged statements made in the Respondent's motion. Instead, my colleagues cite *Somerville Construction Co.,* 338 NLRB No. 182, slip op. at 1 fn. 2 (2003), for the proposition that "briefs not authorized by the Board's Rules or its case law generally may not be filed, absent special leave of the Board. Sec. 102.46(h)." Rule 102.46(h), cited by the *Somerville* Board, authorizes reply briefs to be filed in response to answering briefs. Significantly, the rule also expressly permits a party to file a brief in response to a reply brief upon special leave granted by the Board.

Assuming *arguendo* that Section 102.46(h) stands for the broader proposition offered by my colleagues, Respondent, here, has in effect moved for special leave to file with the Board its reply brief to the General Counsel's brief in support of the judge's decision. Aside from the fact that, as noted above, our Rules do not expressly authorize the filing of a reply brief to a brief in support of a judge's decision—or, in this case to a posthearing brief camouflaged as a "supporting" brief—my colleagues offer no reason why the Respondent should not be allowed to submit its reply brief to the Board. Rather, they take the position that the filing of a reply brief is unnecessary because the Board's policy is to disregard argument that is no longer relevant.

In my view, this response only begs the question. For if the Board's policy is to disregard argument that is no longer relevant, why should a party, here the Respondent, be foreclosed from pointing out to the Board such irrelevant facts, arguments, and assertions contained in an opposing party's supporting brief? Who is prejudiced if the Respondent now responds to, in effect, the General Counsel's posthearing brief to the judge? No one. Who is prejudiced if the Respondent is not permitted to respond? Arguably, the Respondent and the Board itself. First, the Respondent, as a litigant before the Board, should not have to be concerned that we, or a member of our staff, have been confused, misled, or even unknowingly tainted by materials no longer relevant or in dispute. Second, if the General Counsel has not excepted to a judge's legal conclusions or the factual findings upon which the judge's conclusions are based, neither we, nor our staffs, should be expending time and resources reviewing argument that was disregarded or testimony that was discredited. Third, the Board's reputation suffers because by declining to consider the Respondent's reply brief in the particular circumstances present here, the Board treats, or appears to treat, opposing parties inequitably, and thus unfairly.

For all these reasons, I would grant the Respondent's motion and consider its reply brief to the General Counsel's resubmitted posthearing brief. For the following reasons, I would also grant, in the alternative, Respondent's Motion to consider its Objection to the General Counsel's resubmission of its posthearing brief as a brief in support of the judge's decision.

As explained above, my colleagues fail to address the merits of the Board's practice of permitting the resubmission to the Board of a posthearing brief where, as here, significant portions of that brief are irrelevant and the consequent difficulties such a resubmission poses for the opposing party. Instead, my colleagues rely on past practice. However, the fact that the Board has followed a

[3] Respondent's Motion and Objection together with General Counsel's Response are appended to this dissent.

practice in the past neither requires nor justifies its continuing to do so in the future when, as here, its appropriateness is challenged and its merit found wanting. The Board's application of its rules must be considered, not arbitrary. See, e.g., *NLRB v. The Washington Star*, 723 F.2d 974 (1984).

Apart from the fact that the Board's practice of automatically, as it were, accepting any posthearing brief, regardless of content, as a brief in support of a judge's decision, is ill-considered, it appears to me that our Rules do not contemplate resubmissions of prehearing briefs in general. The language of Section 102.46(a) permitting a party to submit a brief "in support of the administrative law judge's decision" suggests that such a supporting brief be *in response* to the judge's decision, that is, that it be tailored to the judge's findings of fact and conclusions of law and that it not include material rendered irrelevant by the judge's decision.

My reading of Section 102.46(a) is supported by Section 102.46(c) that carefully imposes content restrictions and requirements on briefs filed in support of a party's exceptions. Such supporting briefs can "*contain no matter not included within the scope of the exceptions*" and must, among other things, "*clearly [present] the points of fact and law relied on*" (emphasis added).[4] To impose requirements such as these on exceptions briefs but permit the resubmission of posthearing briefs as supporting briefs that contain argument and material no longer relevant is inequitable and inconsistent with the tenor of Section 102.46. Finally, my reading of Section 102.46(a) is further supported by Section 102.46(h)'s requirement that "[a]ny reply brief . . . be limited to matters raised in the brief to which it is replying."

In sum, the general tenor of Section 102.46 suggests that a brief in support of a judge's decision be limited to matters raised in the decision that it supports. Common sense also dictates that a brief 'in support" of a judge's decision be limited to the facts and issues set out in the judge's decision itself. For, after all, how can a brief be described as "in support" of a decision if the brief concerns facts and issues irrelevant to that decision? It cannot.

For all these reasons, I would grant the Respondent's Motion to Consider its Objection to the General Counsel's Resubmission of its posthearing brief to the judge as a brief in support of the judge's decision. And I would take this opportunity not only to consider the specific objections raised by Respondent here to the General Counsel's resubmission of its posthearing brief, but also to consider the Board's general approach to such briefs which, under the guise of past practice, allows parties to resubmit in toto posthearing briefs as briefs in support of judge's decisions without critical examination of whether the posthearing briefs are, in fact, responsive to, and in support of, those decisions.

CONCLUSION

For justice to be done, it must be done with equitable administration. In these circumstances, the Board's administration of justice is, or appears to be, inequitable, and its denial of an opportunity to respond unfair. The content of the General Counsel's brief, which was not written in support of the judge's decision, but which is being submitted for that purpose, provides ample cause for accepting Respondent's brief in reply. Therefore, I believe Respondent's motion for the Board to consider its Reply to the General Counsel's resubmitted posthearing brief or, in the alternative, its Objection to that brief, should be granted.

Dated, Washington, D.C., January 16, 2004

Peter C. Schaumber, Member

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[4] Sec. 102.46(c) requires that a brief in support of exceptions to the judge's decision contain "[a] clear and concise statement of the case containing all that is material to consideration of the questions presented[,]" "[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate[,]" and "argument presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on."